SURVEY OF INDIANA ADMINISTRATIVE LAW

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Administrative law is the body of law concerning the operation of administrative agencies. This Article reviews the application of administrative law to agencies operating at the Indiana state and local level. For the most part, the principles of administrative law are well settled in Indiana, and this article summarizes Indiana Administrative Law, and particularly case law, as courts apply those well settled principles to the particular disputes arising during the survey period from October 1, 2007 through September 30, 2008.

I. JUDICIAL REVIEW

Indiana's Administrative Orders and Procedures Act (AOPA) provides that a court may provide relief only if the agency action is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.[1]

Judicial review from agencies not explicitly governed by AOPA frequently applies the same or similar standard of review to decisions of those agencies.

A. Standard of Review—in General

Although the standard of review is deferential in most respects, particularly on issues of fact and statutory interpretation, it is not surprising that the standard of review itself sometimes becomes an issue on appeal as parties try to convince the court to apply a standard which best serves their purposes. This occurred in *Town of Chandler v. Indiana-American Water Co.*[2] when Chandler argued that the standard of review was de novo because the issue was one of statutory interpretation.[3] Indiana-American countered this position and claimed that the reviewing court should defer to the construction of a statute by the administrative agency charged with enforcing it.[4]

Not only did the parties disagree over the appropriate standard of review, but the appellee, Indiana-American, moved to strike portions of Chandler's reply brief because Chandler raised the appropriate standard of review for the first time at the reply stage.[5] On this aspect of the debate, the court of appeals held that the

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1. IND. CODE § 4-21.5-5-14(d) (2005).
2. 892 N.E.2d 1264 (Ind. Ct. App. 2008).
3. *Id.* at 1267.
4. *Id.*
5. *Id.*

issue of which standard of review to apply is always before the reviewing court, and that parties need not present the standard of review as an issue before the court can address it.[6]

After resolving this preliminary issue, the court applied a de novo standard of review because the statute in question was not one that the Indiana Utility Regulatory Commission was charged with enforcing, but rather one which set forth the jurisdiction of the Commission to hear certain disputes.[7]

B. Scope of Review

The Indiana Supreme Court addressed whether it was proper for the reviewing court to reach the merits of a case arising out of an administrative decision in *600 Land, Inc. v. Metropolitan Board of Zoning Appeals of Marion County*.[8] In a 3-2 decision, the court chose to address a critical issue on the merits, despite certain parties' failure to present the question to the Board of Zoning Appeal (BZA).[9]

As the court explained, the landowner sought a special exception from the BZA for land that the landowner intended to develop as a solid waste transfer station and recycling facility.[10] The BZA denied the petition.[11] The landowner sought judicial review and amended its appeal to argue that it was not required to obtain a special exception at all because its use fell within the approved use for the zoning district.[12]

The trial court held that the landowner was required to obtain a special use exception and affirmed the denial of the special exception.[13] The court of appeals agreed that a special use exception was required, but reversed the BZA's denial on grounds that its findings were unsupported by the evidence.[14] The BZA and an adjoining landowner sought transfer.[15]

Although the landowner had not challenged whether it needed a special exception to the BZA, the supreme court indicated it was appropriate to review the case on the merits for three reasons.[16] First, the landowner had been advised to seek the special exception and doing so was the most practical approach that placed the least burden on the legal system.[17] Second, the court found that the BZA or other intervenors were not prejudiced by the way the case evolved—the

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6. *Id.* at 1268.
7. *Id.*
8. 889 N.E.2d 305 (Ind. 2008).
9. *Id.* at 307-08.
10. *Id.* at 306-07.
11. *Id.* at 307.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 307-08.
17. *Id.* at 308.

BZA's decision would have been reviewed de novo as an issue of law.[18] Finally, neither the BZA nor intervenors objected to the issue being raised at the trial court.[19]

After resolving this issue, the majority reversed the trial court and found that the proposed waste transfer station was a permitted use under the zoning ordinance without a special exception.[20] Justice Boehm, writing for the dissent, questioned the majority's reasoning, suggesting that the majority had failed to give appropriate deference to the interpretation advanced by the agency charged with the ordinance's enforcement.[21]

C. Application of Standard of Review

1. Arbitrary and Capricious or an Abuse of Discretion.—Two cases during the survey period contained substantial discussions of the arbitrary and capricious standard. In *Board of Commissioners of LaPorte County v. Great Lakes Transfer, LLC*,[22] the court of appeals upheld a decision by the Office of Environmental Adjudication (OEA) regarding the issuance of a solid waste transfer facility permit.[23] County boards and towns challenged several portions of the OEA's decision as arbitrary or capricious.[24] However, all of their arguments were rejected.

After setting forth the AOPA standard of review, the court of appeals noted that a reviewing court may not "'substitute its judgment for that of the agency.'"[25] The court further stated that "an action is arbitrary and capricious where there is no reasonable basis for the action."[26]

One issue was whether OEA should have granted a permit even though the applicant, Great Lakes Transfer, did not have a permit for road access.[27] The regulation required the applicant to provide a plot plan showing how the facility would have road access.[28] The court found that OEA's decision was not arbitrary or capricious.[29] In addition, the court held that OEA's decision was not arbitrary or capricious even though Great Lakes Transfer's building permit was later rescinded because when the permit was issued, Great Lakes Transfer had a valid

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18. *Id.*
19. *Id.*
20. *Id.* at 312.
21. *Id.* (Boehm, J., dissenting).
22. 888 N.E.2d 784, 787 (Ind. Ct. App. 2008).
23. *Id.*
24. *Id.*
25. *Id.* at 788 (quoting Ind. Dep't of Envtl. Mgmt. v. Boone County Res. Recovery Sys., Inc., 803 N.E.2d 267, 271 (Ind. Ct. App. 2004)).
26. *Id.* at 789 (citing *Boone County*, 803 N.E.2d at 272.).
27. *Id.* at 791.
28. *Id.* at 794.
29. *Id.* at 795.

building permit.[30] The court of appeals also emphasized that the applicant would not be exempt from complying with other state and local requirements, such as having a driveway permit[31] or building permit,[32] just because it had the IDEM permit.

Appellants also argued that IDEM failed to consider concerns regarding wetlands surrounding the site, however, both the trial court and court of appeals found that there was no requirement for IDEM to consider generalized possibilities of harm.[33]

With regard to the appellants' final argument that IDEM ignored certain other environmental concerns expressed by the public, the court found that those arguments were based on a separate statute discussing IDEM's duty to investigate concerns.[34] IDEM properly conducted public hearings and received public comments, and there was no evidence of negative environmental impact; so, the decision was not arbitrary or capricious.[35]

In *Madison State Hospital v. Ferguson*[36] a nurse supervisor at a state hospital challenged the State's pay plan for nurses which resulted in night nurses receiving higher pay than nurse supervisors.[37] The court of appeals determined that the State Employees' Appeals Commission (SEAC) did not act arbitrarily or capriciously.[38] The SEAC had analyzed national and local market surveys, which showed a high turnover rate of night nurses and the difficulties experienced in recruiting people to fill that position.[39] This data analysis showed that the agency action was not arbitrary and capricious.[40]

2. Contrary to Law.—The Indiana Natural Resources Commission's (NRC) determination regarding parties riparian rights—specifically the manner of determining boundaries that extend from shore—was challenged as being contrary to law in *Lukis v. Ray*.[41] The trial court found that the NRC's determination was contrary to law, but the court of appeals reversed.[42] Case law indicated several different methods of establishing the extension of boundaries into a lake.[43] The NRC used one method, but the trial court adopted a different

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30. *Id.* at 798-801.
31. *Id.* at 795.
32. *Id.* at 801.
33. *Id.* at 801-02.
34. *Id.* at 803-04
35. *Id.* at 804.
36. 874 N.E.2d 615 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 39 (Ind. 2008).
37. *Id.* at 617-18.
38. *Id.* at 620. *Madison State* also presented a challenge alleging the SEAC's decision was contrary to law. *Id.* at 621. This too was rejected. *Id.*
39. *Id.*
40. *Id.*
41. 888 N.E.2d 325, 326 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1225 (Ind. 2008).
42. *Id.* at 333.
43. *Id.* at 331-32.

analysis.[44] The court of appeals found that the trial court had impermissibly second guessed the agency.[45]

The court of appeals held that an agency had erred as a matter of law in *In re South Haven Sewer Works, Inc.*[46] A consent decree between the federal Environmental Protection Agency (EPA) and South Haven required South Haven to obtain the EPA's prior approval before filing a petition with the Indiana Utility Regulatory Commission (IURC) to expand its service territory.[47] The IURC issued a certificate of territorial authority (CTA) despite the fact that South Haven had not complied with the decree.[48] In issuing the CTA, the IURC relied upon extrinsic evidence including testimony and other documents to determine the intent of the parties.[49] The court of appeals determined that the IURC had erred because the language of the consent decree was unambiguous and its terms were conclusive.[50]

Conflicts between two agencies arose in *Pierce v. State Department of Correction*,[51] which concerned the Department of Correction's (DOC) interpretation of its authority to order teachers within correctional facilities to have special education licenses.[52] Under an agreement between the State of Indiana and the U.S. Department of Justice, the State agreed that all teachers in specific correctional facilities would obtain special education certificates.[53] The DOC then sought to apply the same rule to all facilities in the state.[54] A group of teachers filed complaints which reached the SEAC. The SEAC agreed that the DOC could require the teachers to obtain a special education license, but it also recommended that the DOC assist the teachers in paying for obtaining the new licenses and to establish a waiver system.[55]

The underlying issue required the court to decide how to reconcile title 11 of the Indiana Code, which concerns corrections, and title 20 of the code, which governs education.[56] After undertaking its own review of the statutes in question, the court found that the DOC's interpretation of the statutes was not unreasonable and therefore not arbitrary, capricious, or in violation of constitutional, statutory, or legal principles.[57]

With regard to whether the trial court improperly ordered the DOC to comply

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44. *Id.* at 332.
45. *Id.*
46. 880 N.E.2d 706 (Ind. Ct. App. 2008).
47. *Id.* at 709-10.
48. *Id.*
49. *Id.* at 712.
50. *Id.*
51. 885 N.E.2d 77 (Ind. Ct. App. 2008).
52. *Id.* at 78.
53. *Id.* at 79.
54. *Id.* at 80.
55. *Id.* at 82-87.
56. *Id.* at 88.
57. *Id.* at 91.

with SEAC's recommendations, the court of appeals held that the SEAC's recommendations were not mandatory.[58] The recommendations were made under the part of the statute that speaks broadly to SEAC's authority to recommend policy and the trial court had improperly ordered the DOC to comply.[59]

3. Substantial Evidence.—Challenges based on substantial evidence are not frequently successful, as the cases arising during the survey period show. A decision by the BZA not to grant a special exception was reviewed for substantial evidence in *Midwest Minerals, Inc. v. Board of Zoning Appeals*.[60] The court of appeals stated that "evidence will be considered substantial if it is more than a scintilla and less than preponderance. In other words, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[61] The Zoning Ordinance at issue indicated that an applicant may be awarded a special exception if it met three requirements.[62] The BZA found that the landowner failed to meet one of the requirements, specifically the applicant had failed to prove that its proposed use of the property would not be injurious to the public health, safety, comfort, morals, convenience, or general welfare of the community.[63]

The court of appeals found that the BZA's decision was supported by substantial evidence.[64] The crux of the applicant's appeal was that once it complied with the relevant statutory criteria, granting a special exception was mandatory.[65] The court disagreed, finding that the BZA had discretion to deny the permit if it found the application would not serve the public welfare, even if the applicant met the other criteria.[66]

An issue of substantial evidence was also presented in *Dietrich Industries, Inc. v. Teamsters Local Unit 142*.[67] In *Dietrich* a company appealed the Unemployment Insurance Review Board's determination that its employees were eligible for benefits during a lockout and subsequent "start-up."[68] A key issue relative to the entitlement of benefits was whether the parties had reached an impasse in negotiations. The Administrative Law Judge (ALJ) found that an impasse existed from May to September, but not at the time of the lockout.[69] The court stated that the existence of an impasse is a factual determination, which the

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58. *Id.* at 93.

59. *Id.*

60. 880 N.E.2d 1264 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1223 (Ind. 2008).

61. *Id.* at 1269 (citing Crooked Creek Conservation & Gun Club v. Hamilton County N. Bd. of Zoning Appeals, 677 N.E.2d 544, 547-48 (Ind. Ct. App. 1997)).

62. *Id.*

63. *Id.* at 1270 (citing *Crooked Creek*, 677 N.E.2d at 547).

64. *Id.* at 1269-70.

65. *Id.* at 1270.

66. *Id.*

67. 880 N.E.2d 700 (Ind. Ct. App. 2008).

68. *Id.* at 702.

69. *Id.* at 703-04.

court was bound to uphold as long as it was supported by substantial evidence.[70] The court defined an impasse as the "absence of an atmosphere in which a reasonably foreseeable settlement of the disputed issues might be resolved,"[71] and the court could not say that the ALJ had erred by finding the offer to return to work created such an atmosphere.[72]

In *Employee Benefit Managers, Inc. of America v. Indiana Department of Insurance*,[73] the court stated that the substantial evidence standard is met "[i]f a reasonable person would conclude that the evidence and the logical and reasonable inferences therefrom are of such a substantial character and probative value so as to support the administrative determination."[74] The company challenging the agency's decision did not meet its burden of showing a lack of substantial evidence because the company's president had conceded certain deficiencies.[75] The company argued that the findings emphasized minor portions of testimony and that it had substantially complied with requirements.[76] The court of appeals rejected these arguments.[77]

The court of appeals also discussed the proper application of the *McDonnell Douglas* burden-shifting analysis applicable to employment discrimination cases in *Whirlpool Corp. v. Vanderburgh County-City of Evansville Human Relations Commission*.[78] Reviewing courts can (1) only point out legal errors in the application of the *McDonnell Douglas* burden-shifting method, and (2) examine the record for substantial evidence of each prong of the analysis.[79]

D. Statutory Interpretation

Two cases during the survey period reached different results on issues of statutory interpretation. *Indiana Department of Environmental Management v. Construction Management Associates, L.L.C.*,[80] contains a very good summary of how courts approach issues of statutory interpretation.[81] IDEM is charged with enforcing the Federal Safe Drinking Water Act (SDWA) within Indiana.[82] As part of enforcing that regulation, the Indiana Water Pollution Control Board

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70. *Id.* at 704.

71. *Id.* at 703 (quoting Auburn v. Review Bd. of Ind. Employment Sec. Div., 437 N.E.2d 1011, 1014 (Ind. Ct. App. 1982)).

72. *Id.* at 703-04.

73. 882 N.E.2d 230 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1217 (Ind. 2008).

74. *Id.* at 237.

75. *Id.*

76. *Id.*

77. *Id.*

78. 875 N.E.2d 751, 758 (Ind. Ct. App. 2007).

79. *Id.* at 759-60.

80. 890 N.E.2d 107 (Ind. Ct. App. 2008).

81. *Id.* at 112-14.

82. *Id.* at 109.

promulgated regulations defining a "public water system."[83] IDEM claimed that a construction company was operating a "public water system" for an apartment complex that had been constructed in two phases.[84] On appeal, IDEM claimed the trial court failed to defer to IDEM's reasonable interpretation of a rule it is charged with enforcing.[85]

The court of appeals set forth the framework courts should use when reviewing an issue of statutory interpretation by first noting that issues of statutory interpretation are questions of law reviewed de novo.[86] "When a statute has not previously been construed, [a court's] interpretation is controlled by the express language of the statute and the rules of statutory construction."[87] If a term in the statute is undefined, the reviewing court must "'examine the statute as a whole and attribute the common and ordinary meaning to the undefined word, unless doing so would deprive the statute of its purpose or effect.'"[88]

Nevertheless, the court of appeals suggested that even under a de novo standard, the agency's interpretation of a statute it is charged with enforcing is entitled to deference. The agency's interpretation "is entitled to great weight, unless that interpretation is inconsistent with the statute itself."[89] As the court further explained, "[o]nce a court determines that an administrative agency's interpretation is reasonable, it should 'terminate [] its analysis' and not address the reasonableness of the other party's interpretation."[90] This rule acknowledges the expertise of agencies, empowers such agencies to interpret and enforce statutes, and increases public reliance on agency interpretations.[91]

The court of appeals found that IDEM's interpretation was reasonable even though it hinged on a meaning of a term which was undefined in the statute.[92] The court found that IDEM's definition was supported by Black's Law Dictionary and Webster's Third New International Dictionary as well as Congress's intent in passing the SDWA.[93]

A similar question arose in *South Bend Community School Corp. v. Lucas*,[94] where a teacher with the federally funded Head Start program applied for employment compensation during the program's summer break.[95] Indiana has

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83. *Id.* at 110.

84. *Id.*

85. *Id.* at 111.

86. *Id.* at 112.

87. *Id.* (citing Ross v. Ind. State Bd. of Nursing, 790 N.E.2d 110, 119 (Ind. Ct. App. 2003)).

88. *Id.* (quoting Consolidation Coal Co. v. Ind. Dep't of State Revenue, 583 N.E.2d 1199, 1201 (Ind. 1991)).

89. *Id.* at 113 (citing LTV Steel Co. v. Griffin, 730 N.E.2d 1251, 1257 (Ind. 2000)).

90. *Id.* (quoting Ind. Wholesale Wine & Liquor Co. v. State *ex rel.* Ind. Alcoholic Beverage Comm'n, 695 N.E.2d 99, 105 (Ind. 1998)).

91. *Id.* (citing *Ind. Wholesale Wine*, 695 N.E.2d at 105).

92. *Id.*

93. *Id.* at 113-14.

94. 881 N.E.2d 30 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 52 (Ind. 2008).

95. *Id.* at 31.

"statutorily excluded employees of educational institutions from receiving unemployment benefits for periods of unemployment between academic terms,"[96] however, the statute does not define "educational institution."[97] The Unemployment Insurance Review Board found that the Head Start program was not an educational institution within the meaning of the relevant statute and therefore that the teacher was eligible for unemployment insurance during the summer breaks.[98]

The court of appeals set forth the statutory framework[99] and found that the Board's decision was incorrect.[100] In doing so, the court relied heavily on legislative intent that the Head Start program be treated as an educational institution for the purpose of unemployment compensation.[101]

Judge Riley's dissenting opinion stated that the majority failed to follow its quoted standard of review that the reviewing court should defer to the agency charged with enforcing a statute when the court is faced with two reasonable interpretations.[102] Judge Riley listed several reasons why she believed that the educational aspect of the Head Start program was incidental to its primary purpose of bringing the children to a level of social development where they would be better equipped to deal with the environment of the traditional school.[103] Therefore, Judge Riley concluded that the Board's interpretation was reasonable and she would have affirmed that decision.[104]

In another case during the survey period, the court of appeals found that the Worker's Compensation Board's interpretation of a statute providing death benefits was reasonable.[105] There was no modern case law on point as to whether a separated spouse was entitled to death benefits and the Board determined that the living arrangement did not satisfy the statutory requirements for compensation as a presumptive dependent.[106]

E. Summary Judgment

When a reviewing court is faced with a motion for summary judgment, the court of appeals noted that in addition to the summary judgment standard set forth under Trial Rule 56, when the "procedural requirements are satisfied, a judgment of an administrative board is deemed prima facie correct."[107]

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96. *Id.* at 32.
97. *Id.* at 32-33 (referencing IND. CODE § 22-4-14-7(a)(1) (2007)).
98. *Id.* at 30-31.
99. *Id.* at 32.
100. *Id.* at 34-35.
101. *Id.*
102. *Id.* at 36 (Riley, J., dissenting).
103. *Id.*
104. *Id.*
105. Gonzalez v. Wal-Mart Assocs., 881 N.E.2d 19, 24-25 (Ind. Ct. App. 2008).
106. *Id.*
107. Thornberry v. City of Hobart, 887 N.E.2d 110, 118 (Ind. Ct. App.) (citing Wiebke v. City

F. Subject Matter Jurisdiction

With limited exceptions, the subject matter jurisdiction of courts to review agency decisions requires the party seeking review to exhaust its administrative remedies. Whether a party has done so is an issue that frequently arises in administrative law cases. The court of appeals discussed the genesis of the exhaustion of administrative remedies doctrine in *LHT Capital, LLC v. Indiana Horse Racing Commission*.[108] The court reviewed the AOPA exhaustion of remedies requirements codified at Indiana Code section 4-21.5-5-4(a) and the Indiana Supreme Court's cases discussing the policy reasons for the doctrine and considerations of judicial economy.[109]

In *LHT*, a minority interest holder in a race track sought review of the horse racing commission's order imposing a transfer fee on divestment of the minority interest holder's interest.[110] The court of appeals found that the minority interest holder had not exhausted its administrative remedies. The minority interest holder conceded that it did not raise challenges to the transfer fee at the formal hearing, but relied upon other evidence and communications in which it had raised the issue with the Board.[111]

The minority interest holder argued in the alternative that exhausting its administrative remedies would have been futile, and futility is an exception to the exhaustion of remedies requirement.[112] In order to meet the requirements of the futility exception "'one must show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances.'"[113]

The minority interest holder argued that the commission "informed [the minority interest holder] that the Commission had 'declined to hear any challenge to the validity and constitutionality of its transfer tax issue.'"[114] However, those communications had allegedly taken place outside of the hearing and there was no evidence in the record of the communications.[115] The court of appeals therefore found that LHT had failed to demonstrate that presentation to the commission would have been futile.[116]

LHT also argued that it was not required to exhaust its administrative

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of Fort Wayne, 263 N.E.2d 379, 383 (Ind. Ct. App. 1970)), *trans. denied*, 898 N.E.2d 1226 (Ind. 2008).

108. 891 N.E.2d 646, 652 (Ind. Ct. App.), *reh'g denied*, 895 N.E.2d 124 (Ind. Ct. App. 2008).

109. *Id.*

110. *Id.* at 650-51.

111. *Id.* at 653.

112. *Id.* at 654.

113. *Id.* (quoting Johnson v. Celebration Fireworks, 829 N.E.2d 979, 984 (Ind. 2005)).

114. *Id.*

115. *Id.*

116. *Id.*

remedies because the rule was facially invalid or unconstitutional.[117] The court of appeals acknowledged the Indiana Supreme Court precedent that, under some circumstances, litigants may bypass the exhaustion requirement where "'a statute is void on its face' and 'if an agency's action is challenged to be ultra vires and void.'"[118] The court of appeals distinguished LHT's actions from those in other Indiana cases because LHT did not file a declaratory judgment action challenging the regulation.[119] The court of appeals also noted that LHT filed a petition with the commission and negotiated an agreement that allowed for "a quick resolution."[120] The court concluded that

> this is a case where "[e]ven if the ground of the complaint is the unconstitutionality of the statute, which may be beyond the agency's power to resolve, the exhaustion of administrative remedies may still be required because the administrative action may resolve the case on other grounds without confronting broader legal issues."[121]

Having accepted the benefits of the agreement with the commission, LHT could not subsequently litigate that the terms were unconstitutional.[122]

A similar result was reached in *Goldstein v. Indiana Department of Local Government Finance*.[123] In *Goldstein,* homeowners filed a petition for judicial review in the Indiana Tax Court challenging the legality of a vote increasing the county's income tax and asserting other constitutional claims related to property tax and assessment.[124] The Indiana Tax Court found that it did not have subject matter jurisdiction to hear the dispute because the petitioners had failed to exhaust their administrative remedies.[125]

The court noted that "[s]ubject matter jurisdiction is the power of a court to hear and determine a particular class of cases."[126] The tax court further stated that "[s]ubject matter jurisdiction is not conferred upon a court by consent or agreement of the parties to litigation; rather, it can only be conferred upon a court by the Indiana Constitution or by statute."[127] Under Indiana Code section 33-26-3-1 the "tax court has exclusive jurisdiction over any case that arises under the tax laws of Indiana and that is an initial appeal of a final determination made by: (1) the department of state revenue . . . ; or (2) the Indiana board of tax

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117. *Id.*

118. *Id.* (quoting Ind. Dep't of Evtl. Mgmt. v. Twin Eagle L.L.C., 798 N.E.2d 839, 844 (Ind. 2003)).

119. *Id.* at 655-56.

120. *Id.* at 656.

121. *Id.* (quoting *Twin Eagle*, 798 N.E.2d at 844).

122. *Id.*

123. 876 N.E.2d 391 (Ind. Tax Ct. 2007).

124. *Id.* at 392.

125. *Id.* at 396.

126. *Id.* at 393 (citing K.S. v. State, 849 N.E.2d 538, 540 (Ind. 2006)).

127. *Id.* (citing State v. Sproles, 672 N.E.2d 1353, 1356 (Ind. 1996)).

review."[128]

The homeowners argued that they should be exempt from the final determination requirement for three reasons.[129] The homeowners claimed that exhausting their administrative remedies would be either inadequate or futile because neither the Department of State Revenue nor the Indiana State Board of Tax Review were "empowered to rule on the 'global' constitutional challenges that they . . . raised."[130] The tax court admitted that the Indiana Supreme Court "has acknowledged that construing Indiana's constitution 'is not the job, nor an area of expertise' of Indiana's administrative tax agencies."[131] However, the tax court cited additional authority from the Indiana Supreme Court that "taxpayers, including those raising pure constitutional claims, must first pursue the administrative procedures as established by the Legislature."[132]

The constitutional issue exception was successfully applied in *Miller*.[133] In that case, however, the court was trying to prevent an application of waiver to a litigant who had not received the due process to which he was entitled.[134]

The homeowners in *Goldstein* also claimed that they should be excused from exhaustion of administrative remedies because the issues they raised were of such "unparalleled public interest" that they warranted an immediate ruling on the merits by the tax court.[135] The court of appeals acknowledged the Indiana Supreme Court's action in ruling on claims of taxpayers resulting from assessment issues,[136] but the court found that it simply did not have subject matter jurisdiction in this case.[137]

Finally, the court of appeals rejected the homeowners' claims that the court might have jurisdiction under Indiana Code section 36-4-4-5.[138] The tax court found that Indiana Code section 36-4-4-5 relates "to a court of general jurisdiction's authority to assign responsibility for an act to the appropriate executive or legislative body."[139]

G. Filing the Record and Other Procedural Issues

MicroVote General Corp. v. Office of the Secretary of State[140] affirms that

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128. IND. CODE § 33-26-3-1 (2008).

129. *Goldstein*, 876 N.E.2d at 394-96.

130. *Id.* at 394.

131. *Id.* (citing *Sproles*, 672 N.E.2d at 1356).

132. *Id.* (emphasis omitted).

133. *See* discussion *infra* Part II.B.5.

134. Miller v. Ind. Dep't of Workforce Dev., 878 N.E.2d 346, 353 (Ind. Ct. App. 2007).

135. *Goldstein*, 876 N.E.2d at 394-95.

136. *Id.* at 395 (discussing State *ex rel.* Atty. Gen. v. Lake Superior Court, 820 N.E.2d 1240 (Ind. 2005)).

137. *Id.*

138. *Id.*

139. *Id.* at 396 (citing IND. CODE § 36-4-4-5 (2007)).

140. 890 N.E.2d 21 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1227 (Ind. 2008).

the failure of a party seeking judicial review to file the agency record, or request an extension, within the thirty days allowed by AOPA subjects the case to dismissal.[141] In *MicroVote*, a voting machine corporation sought to challenge a determination by the Secretary of State, but did not attach the evidentiary record relied upon by the ALJ and the Secretary of State.[142]

The voting machine corporation argued that it had substantially complied with the requirement to file the record.[143] Under the precedent from *Izaak Walton League* "less-than-full compliance" with AOPA's requirements may be acceptable if the materials which are submitted provide the reviewing court with all that is necessary in order to accurately assess the challenged agency action.[144] In *MicroVote*, however, the court of appeals determined that the submitted materials did not meet this standard.[145]

The voting machine corporation also alleged that the doctrine of equitable estoppel excused its late filing.[146] The claim was rejected by the court of appeals.[147]

The court found that alleged mistakes made by the trial court personnel could not form the basis of a claim of equitable estoppel because neither the trial court nor its personnel were parties to the litigation.[148] The court also rejected an estoppel claim with regard to the Secretary of State.[149] The court stated that the voting machine corporation was responsible for managing its case and should have requested an extension when it became clear that the Secretary of State's office would not be able to prepare the agency record within the thirty day time frame.[150]

The petitioner in *Wrogeman v. Roob*[151] also advanced a substantial compliance argument.[152] As in *MicroVote*, the court of appeals held that the petitioner had not sufficiently complied with requirements to file the agency record because it only submitted one document from the agency record.[153]

H. Standing

An issue of standing arose in *Burcham v. Metropolitan Board of Zoning*

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141. *Id.* at 25.

142. *Id.* at 27.

143. *Id.* at 26 (citing Izaak Walton League of Am., Inc. v. DeKalb County Surveyor's Office, 850 N.E.2d 957, 965 (Ind. Ct. App. 2006)).

144. *Id.* (citing *Izaak Walton League*, 850 N.E.2d at 965).

145. *Id.* at 27.

146. *Id.* For a discussion of the doctrine of estoppel, see *infra* Part II.F.

147. *MicroVote*, 890 N.E.2d at 28.

148. *Id.*

149. *Id.*

150. *Id.*

151. 877 N.E.2d 219 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 41 (Ind. 2008).

152. *Id.* at 220-21.

153. *Id.* at 222.

Appeals Division of Marion County.[154] Two property owners and a community association appealed an order granting a zoning variance to a fireworks retailer.[155] The court of appeals reversed the BZA's initial decision because the BZA's findings were not supported by the evidence.[156] The fireworks retailer then filed a declaratory judgment action to determine whether the BZA had jurisdiction to amend its prior findings, and the trial court found that it did.[157]

The BZA subsequently modified its previous findings of fact, and the community association sought judicial review.[158] After the trial court affirmed the BZA's modification, the community association appealed.[159] Because the two individual property owners were voluntarily dismissed from the appeal, the BZA and the fireworks retailer asserted that the community association no longer had standing to pursue the appeal.[160]

The court of appeals in *Burcham* clarified a line of cases which have incorrectly held that standing "'may be raised at any point during the litigation and if not raised by the parties it is the duty of the reviewing court to determine the issue *sua sponte*.'"[161] The court stated that standing can be "'waived by the failure to make a timely objection.'"[162] However, in this case, the community association was not given the opportunity to litigate the standing issue in the trial court, and therefore the issue of standing was waived.[163]

A different standing issue was presented in *Sexton v. Jackson County Board of Zoning Appeals*.[164] In *Sexton* the issue was whether the neighbors were "aggrieved" by the BZA's decision granting a special exception to build and operate a concentrated animal feeding operation.[165] Surrounding homeowners had presented evidence that they would suffer a pecuniary loss if the permit was granted, which was sufficient to establish standing to petition for writ of certiorari.[166]

I. Supplementation of Record

In general, parties may not supplement the agency record during the judicial

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154. 883 N.E.2d 204, 207 (Ind. Ct. App. 2008).

155. *Id.* at 207-08.

156. *Id.* at 208.

157. *Id.* at 208-09.

158. *Id.*

159. *Id.* at 209-10.

160. *Id.* at 210.

161. *Id.* at 211 (quoting *In re* City of Fort Wayne, 381 N.E.2d 1093, 1095 (Ind. Ct. App. 1978)).

162. *Id.* (quoting Wildwood Park Cmty. Ass'n v. Fort Wayne City Plan Comm'n, 396 N.E.2d 678, 681 (Ind. Ct. App. 1979)).

163. *Id.* at 212.

164. 884 N.E.2d 889 (Ind. Ct. App. 2008).

165. *Id.* at 893.

166. *Id.* at 894.

review stage of a proceeding; however, two cases addressed supplementation of the record during the survey period. In *Sexton*, homeowners who alleged a violation of Indiana's Open Door law should have been allowed to supplement the record on judicial review to include a videotape of the hearing where the alleged violation occurred.[167] In *Burcham*, the reviewing court did not abuse its discretion by refusing to admit supplemental evidence because the proponent of the evidence did not show that it was prejudiced by exclusion of the information.[168]

J. Remand and Reversals

In *Burcham*, the court of appeals reversed, but did not remand, an appeal of a BZA decision. The effect was to vacate and nullify the trial court's decision. "'The parties [were] then restored to the position they held before the judgment was pronounced and [ordered to] take their places in the trial court at the point where the error occurred, and proceed to a decision.'"[169]

In *Jackson v. Indiana Family & Social Services Administration*,[170] the court of appeals stated that the trial court should remand to agency for further fact finding under Indiana Code section 4-21.5-5-12(b) when a relevant law or policy changes in a way that could alter the outcome of a case.[171]

II. Agency Action

The next group of cases this Survey discusses address issues other than those falling under judicial review such as scope of agency action and adjudications.

A. Scope of Agency Action

As purely statutory creations, the power of administrative agencies is generally considered to be limited to those powers explicitly granted by statute. There are some exceptions to this general rule, however. For example, in *Jet Credit Union v. Loudermilk*,[172] the court of appeals held that an administrative agency could issue an opinion letter even without explicit statutory authority to do so.[173] Jet Credit Union sought advice from the Indiana Department of Financial Institutions (DFI) on whether to permit a withdrawal of funds by a director and officer who was liable to the credit union.[174] The member,

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167. *Id.* at 894-95.

168. *Burcham*, 883 N.E.2d at 213.

169. *Id.* at 215 n.3 (quoting Grand Trunk W. R.R. Co. v. Kapitan, 698 N.E.2d 363, 366 (Ind. Ct. App. 1998)).

170. 884 N.E.2d 284 (Ind. Ct. App. 2008).

171. *Id.* at 292. The court of appeals also found that the trial court abused its discretion by dissolving a stay it had entered under Indiana Code section 4-21.5-5-9. *Id.* at 293.

172. 879 N.E.2d 594 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

173. *Id.* at 598.

174. *Id.* at 596.

Loudermilk, charged Jet with conversion and Jet sought to rely upon the opinion letter from DFI.[175]

The court of appeals held that administrative agencies have "broad authority to interpret and enforce pertinent statutes."[176] Even though there was nothing explicitly authorizing or prohibiting DFI's interpretation of the statute, the court declined to hold that "an administrative agency necessarily 'oversteps' its authority anytime it interprets a statute."[177]

In another case supporting broad agency powers, the court of appeals found that the Indiana Attorney General's Office was not prevented from enforcing a nonresident's compliance with an information request through Indiana courts because of lack of personal jurisdiction.[178]

Conflicts between state and federal regulatory authority also can arise. In *South Haven*, the issue was whether state regulatory authority was preempted by federal authority.[179] The court of appeals found that a consent decree from the EPA imposing obligations on a utility to obtain an approval from the EPA before expanding its territory did not interfere with the state agency's regulatory authority.[180] The court of appeals stated that the utility voluntarily assumed additional controls over its operation and the IURC was still empowered to make the ultimate decision on whether to grant the utility's request for expansion.[181]

B. Adjudications

1. Scope of Adjudication.—Questions can arise regarding whether an agency has authority to take a particular action. *Christopher R. Brown, D.D.S. v. Decatur County Memorial Hospital*[182] presented an interesting contrast to the court of appeals' decision in *Jet*. In *Brown*, the Indiana Supreme Court held that the Worker's Compensation Board cannot award prejudgment interest in the absence of express statutory authority.[183] The statute in question was silent on the issue of prejudgment interest so the Board awarded prejudgment interest because the statute did not expressly prevent it.[184]

Although the supreme court noted the deferential standard of review for interpretations of a statute by the administrative agency charged with the statute's enforcement, the court found that the Board's determination was erroneous.[185] The court recognized that the workers compensation statute is in derogation of

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175. *Id.* at 597.
176. *Id.* at 598.
177. *Id.*
178. Everdry Mktg. & Mgmt., Inc. v. Carter, 885 N.E.2d 6, 15 (Ind. Ct. App. 2008).
179. *In re* S. Haven Sewer Works, Inc., 880 N.E.2d 706, 712 (Ind. Ct. App. 2008).
180. *Id.*
181. *Id.*
182. 892 N.E.2d 642 (Ind. 2008).
183. *Id.* at 644.
184. *Id.* at 646.
185. *Id.* at 650.

common law.[186] The court also found that the question presented called for a policy determination—and the court should be hesitant to disturb the "delicate balance the General Assembly has reached."[187]

In *Employee Benefit*, a company engaged in managing the funding and administration of self-funded employee benefits plans claimed the Department of Insurance lacked subject matter jurisdiction to regulate it because it was not an "insurance company" as defined by Indiana Code.[188] After analyzing the statutes involved, the court of appeals determined "for all practical purposes, [the company] was involved in health insurance."[189] However, the court also relied upon a prior agreed entry the company had entered into with the Department to avoid license revocation and protect the "insured" and found that the Department had authority to ensure compliance with the agreement or revoke insurance licenses in the event of non-compliance.[190]

2. Due Process.—"'The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.'"[191] In *Miller*, the court of appeals found that a claimant for unemployment benefits had not received due process when the purpose of the hearing was different than what had been stated in a letter the claimant had received prior to the hearing.[192]

The court of appeals rejected all of the arguments the appellees advanced to address the due process issue.[193] Notice of the issues to be decided was not only required under the department's regulations, but was also a "fundamental requirement of a fair hearing."[194] The court found that the notice the claimant received, which discussed whether he had been looking for work, did not adequately identify the issue of whether or not he had been terminated for just cause.[195]

The most interesting legal argument, however, related to waiver. The appellees argued that the claimant had waived any lack of due process by "failing to lodge a formal objection" at the time of the hearing and again on appeal of the determination to the Review Board.[196] The court of appeals noted that parties can waive constitutional issues if they are raised for the first time on appeal.[197]

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186. *Id.* at 649.

187. *Id.*

188. Employee Benefit Managers, Inc. of Am. v. Ind. Dep't of Ins., 882 N.E.2d 230, 236 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1217 (Ind. 2008).

189. *Id.*

190. *Id.*

191. Miller v. Ind. Dep't of Workforce Dev., 878 N.E.2d 346, 351 (Ind. Ct. App. 2007) (quoting NOW Courier, Inc. v. Review Bd. of Ind. Dep't of Workforce Dev., 871 N.E.2d 384, 387 (Ind. Ct. App. 2007)).

192. *Id.* at 354.

193. *Id.* at 351-54.

194. *Id.* at 352 (citing FTC v. Nat'l Lead Co., 352 U.S. 419 (1957)).

195. *Id.* at 352-53.

196. *Id.* at 353.

197. *Id.* (citing Hite v. Vanderburgh County Office of Family & Children, 845 N.E.2d 175,

However, the court noted that it had "previously declined to find waiver of an issue not raised in an administrative proceeding where resolution of the issue did not require any factual determinations, and required only legal conclusions."[198] The court also excused the claimant's failure to exhaust his administrative remedies by raising the due process argument at the Review Board, because "the question presented is strictly constitutional."[199] The court of appeals declined to invoke waiver, concluding that the transcript clearly showed that the claimant alerted the ALJ to his lack of notice, the issue was strictly legal, and the first time the claimant had legal counsel was on appeal.[200]

A due process argument was raised, but summarily rejected, in *Employee Benefit*.[201] An insurer contended it was denied due process when the Department of Insurance failed to hold an additional compliance hearing for the purpose of allowing the insurer to show the significant steps it was making toward compliance.[202] The court of appeals found that the insurer had a fair opportunity to be heard without the additional compliance hearing.[203] The insurer had ample opportunities to present evidence at three prior hearings, and the insurer failed to claim that it would present dispositive evidence in a future hearing.[204]

3. Hearsay.—Highland Town School Corp. v. Review Board of the Indiana Department of Workforce Development[205] addressed hearsay objections. The court of appeals stated that "parties who proceed pro se are afforded more leeway in an administrative context than in a judicial one."[206] The applicant, for example, did not have to say "hearsay" in making his objections, but he did have to clearly indicate the substantive basis of his objections.[207] The court of appeals found that the applicant in *Highland* did not clearly indicate he was objecting on the basis of hearsay.[208]

4. Ascertainable Standards.—An issue regarding ascertainable standards was raised in *Construction Management*.[209] "Decisions of administrative agencies must be based on ascertainable standards to protect against arbitrary and

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180 (Ind. Ct. App. 2006)).

198. *Id.* (citing Tokheim Corp. v. Review Bd. of Ind. Employment Sec. Div., 440 N.E.2d 1141, 1142 (Ind. Ct. App. 1982)).

199. *Id.* (citing Wilson v. Bd. of Ind. Employment Sec. Div., 385 N.E.2d 438, 441 (Ind. 1979)).

200. *Id.* at 354.

201. Employee Benefit Managers, Inc. of Am. v. Ind. Dep't of Ins., 882 N.E.2d 230, 237 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1217 (Ind. 2008).

202. *Id.* at 237-38.

203. *Id.* at 238.

204. *Id.* at 237.

205. 892 N.E.2d 652 (Ind. Ct. App. 2008).

206. *Id.* at 656.

207. *Id.*

208. *Id.*

209. Ind. Dep't of Envtl. Mgmt. v. Constr. Mgmt. Assoc., 890 N.E.2d 107, 114 (Ind. Ct. App. 2008).

capricious decisions. Such standards are also necessary to give fair warning as to what factors agencies consider in making decisions."[210] The construction company to be regulated challenged IDEM's interpretation of a regulation, claiming IDEM expanded the definition to include a measure of ownership, operation, or proximity without the usual process of notification and adoption of the regulation.[211] The court of appeals rejected this challenge, however, and found that the regulation contained all necessary guidance.[212]

5. Findings Sufficient to Support Judgment.—A claimant for unemployment benefits challenged the sufficiency of the Department of Workforce Development's findings in *Miller v. Indiana Department of Workforce Development*.[213] A labor agreement between the claimant and his employer stated that employees could be terminated for gross negligence.[214] The Department issued findings supporting the employee's termination pursuant to the agreement, even though its findings indicated the employee had only been negligent.[215] The court of appeals therefore found that the Department's findings were insufficient to support its judgment.[216]

C. Administrative Collateral Estoppel

Uylaki v. Town of Griffith[217] presented an issue of administrative collateral estoppel. A town employee sought unemployment benefits after he was discharged.[218] The Department of Workforce Development determined that the employee had been terminated for just cause and was not eligible for benefits.[219] The employee appealed the ruling to an ALJ and to the Department's Review Board, both of which agreed with the initial decision.[220] The employee did not seek judicial review, instead, he filed a wrongful discharge action against the town.[221] The town contended the wrongful discharge action was precluded on the grounds of administrative collateral estoppel.[222] The trial court and court of appeals agreed.[223]

The court of appeals applied a four part test to determine whether

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210. *Id.* (citing State Bd. of Tax Comm'rs v. New Castle Lodge # 147, Loyal Order of Moose, Inc., 765 N.E.2d 1257, 1264 (Ind. 2002)).

211. *Id.* at 114.

212. *Id.* at 114-15.

213. 878 N.E.2d 346, 349 (Ind. Ct. App. 2007).

214. *Id.* at 349-50.

215. *Id.* at 356.

216. *Id.* at 356-57.

217. 878 N.E.2d 412 (Ind. Ct. App. 2007).

218. *Id.* at 413.

219. *Id.*

220. *Id.* at 413-14.

221. *Id.* at 414.

222. *Id.*

223. *Id.* at 414-15.

administrative collateral estoppel applies to bar a plaintiff's claim. The test considers:

> 1) whether the issues sought to be estopped were within the statutory jurisdiction of the agency; 2) whether the agency was acting in a judicial capacity; 3) whether both parties had a fair opportunity to litigate the issues; 4) whether the decision of the administrative tribunal could be appealed to a judicial tribunal.[224]

The only factor which gave the court of appeals any pause was whether the employee "had a fair opportunity to litigate the issue of whether [he] was discharged for just cause."[225] The court of appeals found there was "no indication that [the employee] was prevented from submitting any evidence or calling witnesses on his behalf," and therefore had a fair opportunity to litigate.[226]

D. Minutes/Records

The court of appeals held that an administrative agency could supplement its minutes by affidavit in a declaratory judgment action.[227] Although the court cited the black letter law that "[i]n general, boards and commissions speak or act officially only through the minutes and records made at duly organized meetings,"[228] the court found that evidence that is introduced to "'*supplement* the minutes is properly admissible.'"[229]

E. Correcting Errors

Although there is no statute directly authorizing a zoning board to correct clerical errors in its orders, the court of appeals applied general administrative law principles, including those contained in the AOPA, to hold that a zoning board can correct clerical errors.[230]

F. Estoppel

Two cases concerning estoppel issues arose during the review period. In *Terra Nova Dairy, LLC v. Wabash County Board of Zoning*,[231] an owner of a dairy alleged a BZA should be equitably estopped from imposing certain

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224. *Id.* at 414 (citing McClanahan v. Remington Freight Lines, Inc. 517 N.E.2d 390, 394 (Ind. 1988)).

225. *Id.*

226. *Id.* at 415.

227. Pressley v. Newburgh Town Council, 887 N.E.2d 1012, 1016 (Ind. Ct. App. 2008).

228. *Id.* (citing Borsuk v. Town of St. John, 820 N.E.2d 118, 123 (Ind. 2005)).

229. *Id.* (quoting *Borsuk*, 820 N.E.2d at 123).

230. Burcham v. Metro. Bd. of Zoning Appeals Div. I of Marion County, 883 N.E.2d 204, 215-16 (Ind. Ct. App. 2008).

231. 890 N.E.2d 98 (Ind. Ct. App. 2008).

requirements of a zoning ordinance.[232] Despite the fact that the dairy had received a copy of an outdated ordinance from the BZA director, the court of appeals held that the BZA was not equitably estopped.[233] The court reasoned that the dairy, as property owner, is "'charged with knowledge of the zoning ordinance that affects [its] property.'"[234] The court also found that the dairy did not rely on the information in the outdated ordinance.[235]

A different result was reached in *City of Charlestown Advisory Planning Commission v. KBJ, L.L.C.*[236] A city planning commission approved plans for a subdivision that was within the two-mile fringe of the city, even though the plans did not comply with the city zoning ordinance.[237] A few months later, the subdivision was annexed into the city.[238] The developer of the subdivision subsequently sought approval of some minor changes of the subdivision plan, and the Planning Commission approved the replat.[239] After litigation arose between the developer and the City which revealed that neither party had a copy of the original plat, the developer submitted another plat for approval.[240] The Planning Commission refused to approve the plat because it did not comply with the city zoning ordinance.[241]

The court of appeals found that this was one of the rare times that a government entity was equitably estopped from asserting that the subdivision plans did not comply with the city ordinance.[242] The court of appeals distinguished *Equicor Development Inc. v. Westfield-Washington Township Plan Commission*, because that case involved approval of "similarly situated" non-conforming plats, rather than past approval of the same non-conforming plat.[243] It was also significant to the court that over thirty homes in the subdivision had already been built.[244]

The court also rejected the Planning Commission's argument that it lacked subject matter jurisdiction to approve the original plat, characterizing the Commission's action as a legal error that the Commission failed to timely challenge.[245]

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232. *Id.* at 105.

233. *Id.* at 105-06.

234. *Id.* at 105 (quoting Story Bed & Breakfast L.L.P. v. Brown County Area Plan Comm'n, 819 N.E.2d 55, 64 (Ind. 2004)).

235. *Id.* at 106.

236. 879 N.E.2d 599 (Ind. Ct. App. 2008).

237. *Id.* at 600.

238. *Id.*

239. *Id.* at 600-01.

240. *Id.* at 601.

241. *Id.*

242. *Id.* at 603.

243. *Id.* at 602-03 (citing Equicor Dev. Inc. v. Westfield-Washington Twp. Plan Comm'n, 758 N.E.2d 34 (Ind. 2001)).

244. *Id.* at 603.

245. *Id.* at 602-03.

G. Attorney Fees

A developer in *City of Charlestown* sought attorney fees against a planning commission. The court of appeals held that the developer was not entitled to attorney fees under Indiana Code section 36-7-4-1010(a).[246] The court of appeals held that the statute referred only to costs, which does not encompass attorney fees.[247]

III. INDIANA'S OPEN DOOR LAW

Indiana's Open Door Law provides that "official action" must be conducted at an open meeting.[248] "The purpose of Indiana's Open Door Law is to ensure that the 'official action of public agencies' is conducted openly so that the general public may be fully informed."[249] Several cases concerning Indiana's Open Door Law arose during the survey period, however, each illustrates how difficult it is to reverse agency action.

In *Thornberry v. City of Hobart*[250] a police officer appealed the decision by the Hobart Public Works & Safety Board to terminate his employment.[251] The Board held evidentiary hearings on three dates, but on a subsequent date, two members of the Board met and listened to forty-five minutes of audio tape from one of the prior public hearings.[252] The Public Access Counselor determined that the Board members' meeting amounted to an "executive session" that had not properly been noticed under the Open Door Law.[253]

The Board subsequently reconsidered the matter at a properly noticed executive session and a public meeting and reached the same decision to terminate the police officer.[254] The trial court found that there had been a technical violation of the Open Door Law, but upheld the Board's decision to terminate the police officer.[255] The court of appeals affirmed.[256]

The burden of proof is with the plaintiff to show that final action should be voided.[257] In *Thornberry*, the court of appeals found that "voiding the final

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246. City of Charlestown Advisory Planning Comm'n v. KBJ, L.L.C., 879 N.E.2d 599, 604 (Ind. Ct. App. 2008).

247. *Id.*

248. IND. CODE § 5-14-1.5-2(d)(5)-(6) (2005).

249. *Lake County Trust*, 883 N.E.2d at 135 (quoting City of Gary v. McCrady, 851 N.E.2d 359, 365 (Ind. Ct. App. 2006)).

250. 887 N.E.2d 110 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1226 (Ind. 2008).

251. *Id.* at 113.

252. *Id.* at 115.

253. *Id.*

254. *Id.*

255. *Id.* at 116.

256. *Id.* at 118.

257. *Id.* at 117; *see also* IND. CODE § 5-14-1.5-7(d) (2005) (discussing factors on which a reviewing court should rely).

action would merely require the Board to reconsider the same evidence for a third time . . . [and] would only serve to impose punishment at the public's expense for a technical violation of the Open Door Law."[258]

In another case concerning a police officer, *Guzik v. Town of St. John*,[259] the officer who was accused of misconduct alleged an open door violation when the notice of the Police Commission's executive session did not indicate that job performance evaluations and an individual's status as an employee would be the subject of the executive session.[260] The Police Commission subsequently notified the public of the executive session and prepared minutes that noted the omission of the additional subject matter of the meeting.[261] The Police Commission also held another special meeting, during which it advised the public of the information received and the action that was taken during the executive session.[262]

The court of appeals did not determine whether any technical violation of the Open Door Law had occurred, but instead found that any violation was cured by the Police Commission's subsequent actions.[263] Any violation "did not affect the substance of any decisions, policies, or final actions because none were made, established, or taken" during the executive session.[264]

The court of appeals did not address whether a due process violation had occurred in *Guzik* because the police officer had no notice that he was to be accused of misconduct and had no legal representation at the executive session.[265] The court of appeals did reject the police officer's claims of due process violations founded on Indiana Code section 36-8-9-4(c) and a claim that his resignation was a product of duress.[266]

IV. Statutory Changes

A few statutory changes to AOPA, the Open Door Law or Open Records Act took effect during the survey period. Most of the changes are clarifications, such as those in Indiana Code sections 4-21.5-3.5-8, 4-21.5-4-5 and 4-21.5-7-5. The Open Records Act had the most changes. The Open Door and Open Records Act were amended to include the ports of Indiana and State Department of

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258. *Thornberry*, 887 N.E.2d at 118.
259. 875 N.E.2d 258 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 47 (Ind. 2008).
260. *Id.* at 270.
261. *Id.* at 270-71.
262. *Id.* at 271.
263. *Id.* at 271-72.
264. *Id.* at 272.
265. *Id.* at 267-68.
266. *Id.* at 268.

Agriculture in the exemption regarding negotiations with industrial or commercial prospects.[267] Other changes to the Open Records Act included a new definition of "offender,"[268] including of the Indiana Horse Racing Commission as a public agency,[269] and a definition for the actual cost of copying.[270]

267. IND. CODE §§ 5-14-1.5-6.1, 5-14-3-4(b)(5)(a), 5-14-3-4.9 (2005 & Supp. 2008).
268. *Id.* § 5-14-3-2(i).
269. *Id.* § 5-14-3-2(m)(10).
270. *Id.* § 5-14-3-8(d)(2).